Supreme Court of the United States

OCTOBER TERM, 1942.

Estate of W. M. L. FISKE, Deceased, Central Hanover Bank and Trust Company, Executor,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The citations of the opinions below, the basis of the jurisdiction of this Court, and the questions presented are set forth in the attached Petition, and are therefore not repeated here.

Specifications of Error.

The United States Circuit Court of Appeals erred:

(1) In holding that the taxpayer was not "a bona fide non-resident of the United States for more than six months during the taxable year" within the meaning of Section 116(a) of the Revenue Act of 1936;

(2) In holding that the salary was not an "amount(s) received from sources without the United States" within

the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936;

(3) In holding that the taxpayer was subject to United States income tax on the salary paid to him in the year 1936; and

(4) In reversing the decision of the United States Board of Tax Appeals.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Muhleman* v. *Hoey, supra,* and contrary to the doctrine of *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115, in holding that the salary was not an "amount(s) received from sources without the United States" within the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936.

The decision below apparently decided this question against the taxpayer solely on the ground that the statutory provisions should be construed as requiring that the services performed without the United States be "during the taxable period" (R. 38). The majority opinion stated (R. 38):

> "It is clear before the respondent may claim as exempt the amount received by Fiske, the income must be 'for personal services performed without the United States during the taxable period' and the burden of proving that fact devolved upon the respondent."

On the other hand, the *Muhleman* case, *supra,* held that it was immaterial that the services were rendered by the

taxpayer in a year prior to the taxable year. In the *Muhleman* case, the taxpayer was the London representative of the American Tobacco Company from October 1928 through July 1931. For his services performed in England in 1931, he became entitled to a bonus which he did not receive until 1932 after he had returned and reestablished his residence in the United States. The statutory provisions applicable to 1932, the taxable year involved, were identical with those involved in the present case. The taxpayer in that case, as in the present case, made his returns on a cash basis. The taxpayer in that case, as in the present case, received the funds from an American company while he was in the United States. The court said (at pp. 414, 415):

> "This amount was paid to him in this country by the American Tobacco Company during 1932 for his services performed in 1931, while a resident of London, Eng., as the manager of its foreign subsidiaries.
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> * * * * * *
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> "Sec. 116(a) of the Revenue Act of 1932 exempts from gross income in the case of an individual citizen of the United States who is a bona fide non-resident of this country for more than six months during the taxable year 'amounts received from sources without the United States (except amounts paid by the United States or any agency thereof), if such amounts would constitute earned income.' Sec. 119(c)(3) of the 1932 Act, 26 U. S. C. A. Int. Rev. Code, §119(c)(3), provides that compensation for personal services performed without the United States shall be treated as income from sources without the United States.
>
> "It is plain, therefore, that the above amount received by Mr. Mower was, under the statute, income from sources without the United States and excluded

> from his gross income provided he was a bona fide non-resident of this country during the taxable year. * * *"

The Court went on to hold that the taxpayer was subject to United States income tax because during the taxable year 1932, the year in which he received the compensation, he was not a bona fide non-resident of the United States for more than six months.

In *Lucas* v. *Ox Fibre Brush Co., supra,* this Court held that an amount paid by the taxpayer as extra compensation for services rendered in prior years was deductible by the taxpayer in the year of payment as "compensation for personal services actually rendered". It is submitted that the decision below may be in conflict with that decision or at least may be contrary to the general principles stated therein as to the treatment, for income tax purposes, of compensation for services rendered in a prior year.

II.

The decision of the Circuit Court of Appeals on the question of residence is in conflict with *Penfield* v. *Chesapeake, etc.,* 134 U. S. 351, and perhaps also in conflict with *Texas* v. *Florida,* 306 U. S. 398, and *District of Columbia* v. *Murphy,* 314 U. S. 441.

The Circuit Court of Appeals held that in determining whether the taxpayer was "a bona fide non-resident of the United States for more than six months during the taxable year", the sole consideration was whether the taxpayer had actually been outside of the United States for more than six months during the taxable year. The court appears to have relied at least in part upon three decisions of this

Court, *Penfield* v. *Chesapeake, etc., supra; District of Columbia* v. *Murphy, supra;* and *Texas* v. *Florida, supra.* The pertinent portion of the majority opinion is as follows (R. 37):

> "Residence is the place of abode, whether permanent or temporary, *Penfield* v. *Chesapeake etc.,* 134 U. S. 351, 356, 357, a physical fact, *Matter of Newcomb,* 84 N. E. 950, 954, and means where a man abides or lives, *Hunter* v. *Bremer,* 100 Atl. 809, 811, and so applying the tests enumerated in the cases cited, we believe that Congress was not concerned with the question where a taxpayer had his permanent residence, but rather intended the Act to apply to any American citizen actually outside of the United States for more than six months during the taxable year, engaged in the promotion of American foreign trade, and it is no answer to say that it was at all times Fiske's intention to return to Paris and that he was prevented from carrying out this intention because of illness. Cf. *District of Columbia* v. *Murphy,* 314 U. S. 441. See also *Texas* v. *Florida,* 306 U. S. 398, 424, 425."

It is submitted that, except for the decision below, no case, from the field of taxation or otherwise, supports the proposition that the word "residence" means physical presence alone. It is submitted that no one of the three decisions of this Court cited in the passage just quoted supports any such proposition. The dissenting opinion below said (R. 39):

> "The recent cases of *Texas* v. *Florida,* 306 U. S. 398, and *Dist. of Columbia* v. *Murphy,* 314 U. S. 441, tend to support rather than contradict the Board's decision.

The dissenting opinion then analyzed these decisions of this Court and discussed their application to the instant

facts. This entire discussion in the dissenting opinion is incorporated herein by reference (R. 39-41).

In *Penfield* v. *Chesapeake, etc., supra,* the question was whether the plaintiff was a "resident" of New York within the meaning of the New York Statute of Limitations. This was an action in the Federal Court in New York to recover damages for personal injuries sustained in an accident in Tennessee on November 30, 1882. The plaintiff had lived in New York until he was 14, when he moved to Michigan, then to Illinois and then to St. Louis. At the time of the accident plaintiff was a travelling salesman living in St. Louis with his wife and children. The Statute of Limitations was a bar to this action unless plaintiff became a resident of New York prior to December 1, 1883. Plaintiff contended that he acquired residence in New York prior to December 1, 1883 by virtue of the fact that his wife and children with his consent moved to New York in October, 1883, where they took up their residence and had continued to live until the time of the trial. Plaintiff himself did not come to New York until some time in December, 1883. The court assumed that plaintiff's intentions were such that he had obtained a domicile in New York by virtue of his family, with his consent, having made their home in New York. However, the court held that the plaintiff did not become a resident of New York prior to December 1, 1883 merely by sending his wife and children to New York to live, in view of the fact that plaintiff himself did not go to New York until after that date. The opinion indicates that considerable reliance is being placed upon decisions of the New York courts.

It is submitted that *Penfield* v. *Chesapeake, etc.,* is not authority at all in point in the instant case and that the Circuit Court of Appeals erred in relying upon it. That case simply stands for the proposition that a taxpayer

cannot *become* a resident of a state until he has physically been present there.

In *Texas* v. *Florida, supra,* this Court determined the domicile of a decedent for purposes of state estate and inheritance taxes. In *District of Columbia* v. *Murphy, supra,* the question was as to the domicile of the taxpayer for purposes of the District of Columbia income tax. Neither case involved facts at all similar to those in the instant case. In each case the opinion of this Court laid down general principles as to the determination of domicile. It is submitted that the opinions in those two cases support the position of the taxpayer rather than that of the Government. It is submitted that the decision below was in error to the extent that it was rested upon a construction of the opinions in those two cases and upon the application to the instant case of the general principles as to domicile stated in those two opinions. The majority opinion below cited particularly pages 424 and 425 of the opinion in *Texas* v. *Florida.* Presumably the reference was to the following passages at said pages 424 and 425:

> "Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile. * * * While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there; *Matter of Newcomb, supra,* 250; *Matter of Trowbridge,* 266 N. Y. 283, 292; 194 N. E. 756; and they are of slight weight when they conflict with the fact."

The majority opinion below thought that the term "resident" in Section 116(a) referred to mere residence as distinguished from domicile. The dissenting opinion thought that it referred to domicile. If it is to be interpreted as

referring to mere residence as distinguished from domicile, then it is submitted that the decision below is probably in conflict with the decision of this Court in *Penfield* v. *Chesapeake, etc., supra,* or that at least the Circuit Court of Appeals, in relying upon *Penfield* v. *Chesapeake, etc.,* misread its teaching and improperly extended its authority. *Penfield* v. *Chesapeake, etc.,* merely held that physical presence at *some* time is necessary and that, therefore, one cannot *become* a resident of a state until he actually sets foot in that state. It is submitted that *Penfield* v. *Chesapeake, etc.,* should not be extended to the instant situation and treated as authority for the proposition that "residence" depends solely upon physical presence. To the extent that *Texas* v. *Florida* and *District of Columbia* v. *Murphy* were relied upon by the Circuit Court of Appeals, it is submitted that the Circuit Court of Appeals also misread their teaching and improperly extended their authority.

If "residence" is to be interpreted as referring to domicile, then it is submitted that the decision below is probably in conflict with the decisions of this Court in *Texas* v. *Florida* and *District of Columbia* v. *Murphy, supra,* or that at least it is contrary to the general principles as to domicile enunciated in the opinions in those two cases.

III.

The Circuit Court of Appeals decided two important questions of Federal law (stated *supra* under "Questions Presented") which have not been, but should be, settled by this Court.

The statutory provisions interpreted by the Circuit Court of Appeals, Sections 116(a) and 119(c)(3) of the Revenue Act of 1936, are, and for many years have been,

important provisions of the Federal income tax statute. These provisions have been contained in the Federal income tax statute since 1926* in substantially the same phraseology. They are now incorporated in the Internal Revenue Code as Sections 116(a) and 119(c)(3) thereof.

Surely an authoritative decision by this Court upon the two questions presented (stated *supra* under "Questions Presented") would relieve many taxpayers of uncertainty as to their tax status and would facilitate the administration of the internal revenue laws by the Bureau of Internal Revenue.

IV.

The Circuit Court of Appeals erred in its decision.

A. The Circuit Court of Appeals erred in holding that the salary was not income "from sources without the United States" within the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936.

The majority opinion does not explain why it is necessary to the taxpayer's case that the services performed without the United States be "during the taxable period". It is possible that the majority opinion was handed down under a misapprehension as to the wording of the pertinent statutory provisions since the majority opinion stated (R. 38):

> "It is clear before the respondent may claim as exempt the amount received by Fiske, the income must be 'for personal services performed without the United States during the taxable period,' and the burden of proving that fact devolved upon the respondent."

The quoted phrase "for personal services performed without the United States during the taxable period" is not

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* The statute contained the provision now numbered Section 119(c)(3) even prior to 1926.

an accurate quotation from any pertinent statutory provision or from any opinion cited in the majority opinion. This is pointed out in the following passage from the dissenting opinion in the Circuit Court of Appeals, which demonstrates, it is submitted, that the majority opinion was in error on this question (R. 41):

> "It must be true that the income received by respondent in 1936 was not for personal services rendered either in the United States or France during that year. This is evident from the fact that he was ill during that entire period. The opinion, so I think, erroneously interprets the applicable provision to require that the services performed without the United States be 'during the taxable period.' These words do not appear in the Statutory provision and it has been expressly held in *Muhleman* v. *Hoey,* 124 F. (2d) 414, 415 [42-1 U. S. R. C., Par. 9203], that it is immaterial whether or not the services were rendered during the year for which the income was earned.
>
> "Petitioner is in a precarious situation. He dare not argue that the money received by respondent was a gift, as that would make it exempt. He merely argues that no services were rendered for which the money was received. In my judgment, the Board logically disposed of petitioner's contention in this respect as follows:
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> > " '* * * Although the decedent was away from his place of business and was too ill to perform his duties during 1936, nevertheless, he had rendered services in the past, he was expected to continue to render services in the future, and his employer continued his salary during his illness. *Cf. Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115 [2 U. S. T. C., Par. 522]. His place of employment was in France. He served the company only by rendering personal services. Apparently, the decedent had developed an office organization and a clientele for his employer so that the business could go on even in his absence. His

> employer wanted to hold him as an employee. It is difficult to draw any other conclusion from the fact that the employer paid him the $37,400 in 1936. * * *' "

The opinion of the Board of Tax Appeals (by Member Murdock, the Member who heard the testimony) stated (R. 19, 20):

> "His business was in France, not here. The income was earned as a result of services performed outside the United States. * * *
>
> "* * * We conclude that the amount in question was paid to the decedent as compensation for personal services actually rendered outside of the United States."

It is submitted that the Circuit Court of Appeals should not have disturbed the decision by the trier of fact. The Commissioner elected not to include the testimony and the exhibits as part of the record on appeal.

This case was reviewed by the entire Board and only Member Smith dissented. Thus, the vote of the Board of Tax Appeals on each of the two questions presented was 15 to 1 in favor of the taxpayer. The vote in the Circuit Court of Appeals on each of the two questions presented was 2 to 1 in favor of the Commissioner. The majority opinion below was written by Kerner, C. J. Minton, C. J., concurred. The dissenting opinion was by Major, C. J.

B. The Circuit Court of Appeals erred in holding that the taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year "within the meaning of Section 116(a) of the Revenue Act of 1936".

The Board specifically found (R. 14):

> "The petitioner was a bona fide non-resident of the United States during all of the calendar year 1936."

To the extent that this represented a finding of fact by the Board it was not open to review before the Circuit Court of Appeals. The record of the testimony and exhibits were not before the Circuit Court of Appeals. The only proposition open for argument was the bold theory that, as used in the statute, "residence" meant physical presence as a matter of law and regardless of intention, circumstances or reasons. If intention, circumstances, nature of the stay or any similar factors were to be considered and weighed, the Commissioner was bound by the Board's finding of fact.

The majority opinion below apparently was rested solely on the construction of the statutory provision "a bona fide non-resident of the United States for more than six months during the taxable year" as meaning only a person actually outside of the United States for more than six months during the taxable year.

It is submitted that the majority opinion below erred in holding that "residence" means, as a matter of law, "physical presence" alone. Such a construction completely disregards the words "bona fide" used in Section 116(a). The fact that the word "non-resident" is modified by the adjective "bona fide" establishes that various factors, such as intention or purpose, must be taken into consideration. Physical presence is an absolute fact; it is impossible for such a fact to be bona fide or not bona fide.

It is submitted that no case, from the field of taxation or otherwise, supports the proposition that the word "residence" means physical presence alone.* Under Point II, *supra,* it has been pointed out that neither of the three

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* As pointed out *supra,* the decision of this Court in *Penfield* v. *Chesapeake, etc.,* merely holds that physical presence at *some* time is necessary and that therefore one cannot *become* a resident of a state until he actually sets foot in that state.

decisions of this Court cited in the majority opinion below supports such a proposition.

This contention appears to have been made by the Commissioner of Internal Revenue in only one previous case, which also involved Section 116(a) of the Revenue Act. *Carstairs* v. *United States,* United States District Court for the Eastern District of Pennsylvania (decided January 16, 1936 and not officially reported*), no appeal taken by the Government. The decision of the Circuit Court of Appeals below is directly in conflict with the decision of the District Court in the *Carstairs* case.

In the *Carstairs* case the taxpayer, a citizen of the United States, had been a resident of England for many years. It was his custom to make annual trips to the United States for brief periods. In the taxable year in question, which was the calendar year 1928, he had been in the United States during the first seven weeks of 1928. He then returned to England where he died on July 9, 1928. The Government contended that since he was not physically outside the United States for as much as six months during the year 1928, the exemption provided in Section 116(a) was not applicable. The court rejected the Government's contention that physical presence alone was determinative, said that it was necessary to look at all of the facts, and found that the taxpayer had been a bona fide non-resident of the United States for six months in 1928—this in spite of the fact that during a substantial part of that time he had been physically present in the United States. The opinion (by KIRKPATRICK, D. J.) said:

> "If, as the defendant contends, the Committee Report shows that this clause was inserted in relief

* Opinion to be found at 17 A. F. T. R. 1044, paragraph 9075 of the C. C. H. Federal Tax Service for 1936 and paragraph 660 of the Prentice-Hall Tax Service for 1936.

> of salesmen and foreign representatives of American firms, traveling abroad solely for the purposes of their business, it is difficult to see why the statute did not say so, instead of carefully specifying bona fide *nonresidents,* thus excluding by omission residents of this country abroad for a specific and temporary purpose and accomplishing a result the opposite of that which the defendant says was intended.
>
> "But residence means something other than mere physical presence in a particular place. Of course, physical presence for some substantial part of the time is necessary and it may sometimes be a controlling factor (a man who has never been in England cannot have a residence there), but a factor at least equally important is the state of mind of the subject of the inquiry. To ascertain that, his prior and subsequent life is all more or less relevant. * * *."

The Solicitor General announced his decision that no appeal was to be taken by the Government from this unfavorable decision and none was taken.*

Congress has never attempted to define the word "resident" or "non-resident". Nor have the regulations attempted to define the word "non-resident" as used in Section 116(a). Section 211(a) of the Internal Revenue Code, however, provides for the method of taxing a "non-resident alien individual" and the Treasury Department regulations have defined this phrase in Article 211-2 as follows:

> "An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to

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* See paragraph 255 of Volume 1 of the 1936 Prentice-Hall Federal Tax Service.

> time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this article, in the absence of exceptional circumstances."

This article has remained substantially unchanged since Regulations 65 was issued in 1924. It is submitted that the general principles of this regulation should be applied to the word "non-resident" used in Section 116(a).

In fields other than taxation the courts have rejected the argument that the term "residence" as used in a statute means physical presence alone. The courts have held that residence was something different from mere physical presence under the repatriation statutes

> *United States* v. *Humphrey,* 29 F. (2d) 736 (C. C. A. 5th, 1928);

under the voting statutes

> *Kemp* v. *Heebner,* 234 Pac. 1068, 77 Colo. 177 (1925);

under the statutes providing for application for citizenship

> *In re Conis,* 35 F. (2d) 960 (D. C. S. D. N. Y. 1929);

U. S. v. *Dick,* 291 Fed. 420 (D. C. N. D. N. Y. 1923);

United States v. *Rockteschell,* 208 Fed. 530 (C. C. A. 9th, 1913);

under attachment statutes

Kanawha Banking & Trust Company v. *Swisher,* 144 S. E. 294, 105 W. Va. 476 (1928);

Biggers v. *Bank of Ringgold,* 144 S. E. 397, 398, 38 Ga. App. 521 (1928);

Winakur v. *Hazard,* 116 A. 850, 851, 140 Md. 102 (1922);

under a statute authorizing service of process on a "non-resident"

Bigham v. *Foor,* 158 S. E. 548, 201 N. C. 14 (1931);

under a statute providing exemption from garnishment for a "resident"

McDowell v. *Friedman Bros. Shoe Co.,* 115 S. W. 1028, 135 Mo. App. 276 (1909); and

under a statute giving homestead rights

Nelson v. *Griggs County,* 219 N. W. 225, 226, 56 N. D. 729 (1928).

The hearings before, and the reports of, the Ways and Means Committee referred to in the Board's opinion (R. 16) make clear the purpose of the exemption given by Section 116(a). This section was to relieve American citizens resident in foreign countries and engaged therein in the promotion of American foreign trade from tax upon the

income which they earned in the foreign country. Taxpayer was within the spirit as well as the letter of the law. He had given up his home and business in Chicago and had established his home in Paris as representative of an American business. Congress knew that when an American citizen did this he subjected himself to taxation of the country of his residence. Citizens who become "bona fide" residents of a foreign country in the interests of American foreign trade were to be relieved from double taxation.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 1942.

Appendix.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

* * * * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, * * *

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SEC. 25. CREDITS OF INDIVIDUAL AGAINST NET INCOME.

(a) *Credits for Normal Tax Only.*—There shall be allowed for the purpose of the normal tax, but not for the surtax, the following credits against the net income:

* * * * * * *

(3) *Earned Income Credit.*—10 per centum of the amount of the earned net income, but not in excess of 10 per centum of the amount of the net income.

(4) *Earned Income Definitions.*—For the purpose of this section—

(A) "Earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include any amount not included in gross income, nor that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. * * *

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SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this title:

(a) *Earned Income From Sources Without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

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SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

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(c) *Gross Income From Sources Without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * * * * *

(3) Compensation for labor or personal services performed without the United States;

* * * * * * *